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In the Supreme Court of the United States

October Term, 1973

No. 73-1125

ADMIRAL-MERCHANTS MOTOR FREIGHT, INC., et al.,

Petitioners,

vs.

CONTAINER CORPORATION OF AMERICA and MONTGOMERY WARD & CO., INCORPORATED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

BRIEF FOR PETITIONERS IN REPLY

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March, 1974

INDEX

	Page
TABLE OF AUTHORITIES	ii
INTRODUCTION	1
REASONS FOR GRANTING THE WRIT	5
I. The Seventh Circuit has decided this federal question in a way in conflict with this Court's decision in A. J. Phillips Co. v. Grand Trunk W. Ry, 236 U.S. 662 (1915) and the unbroken line of cases in this Court following that decision	5
II. The inconsistent alternative theories offered by Respondents in lieu of the decision below underline the conflicts between the circuits on the issue actually presented. The proposals conflict with the Seventh Court decisions and *inter se.* They would result in either indefinitely extended periods or no limitations at all. Congress obviously intended that there be a termination of suits within a given time and concurrent extinguishment of rights.	9
III. There is no warrant in law or reason for having a "fixed date" which varies from shipper to shipper and which may vary, as well, from carrier to carrier with respect to each shipper claiming under a single I.C.C. order.	12
CONCLUSION	13

TABLE OF AUTHORITIES

Cases Cited

Page

A & B Transfer, Inc. v. S. S. Kresge Co., ____ F.2d ____ (6th Cir., 1973) 2, 3

A. J. Phillips Co. v. Grand Trunk W. Ry, 236 U.S. 662 (1915) 5, 6, 13

Admiral-Merchants Motor Freight, Inc. v. United States, 321 F. Supp. 353 (D. Colo., 1971) 8

Admiral-Merchants Motor Freight, Inc. v. Aluminum Company of America, 486 F.2d 717 (7th Cir., 1973) 2, 7, 9

Aluminum Co. of America v. Admiral-Merchants Motor Freight, Inc., 337 F. Supp. 674 (N.D. Ill., 1971) 7

American Pipe and Construction Co. v. Utah, 42 U.S.L.W. 4155 (1973) 9, 10, 11

Appleton Electric Co. v. Advance-United Expressways, ____ F.2d ____ (7th Cir., 1974) 3, 4, 11

B. & O. R.R. v. United States, 386 U.S. 372 (1967) 7

Chicago & N.W. Ry v. United States, 311 F. Supp. 860 (N.D. Ill., 1970) 7

City of Danville v. C. & O. Ry, 34 F. Supp. 620 (D. Va., 1940) 5

Corray v. B. & O. R.R., 2 F. Supp. 829 (E.D. Ill., 1933) 8

Gulf, M. & N. R.R. v. Merchants Specialty Co., 50 F.2d 21 (5th Cir., 1931) 7, 8

Increased Rates and Charges, From, To and Between Middlewest Territory, 335 I.C.C. 142 (June 5, 1969) 4

I.C.C. v. Atlantic Coast Line R.R., 383 U.S. 576 (1966) 12

Keogh v. Chicago & N. W. Ry, 260 U.S. 156 (1922) 6

Mid-State Horticultural Co. v. Pennsylvania R.R., 320 U.S. 576 (1943) 6

Missouri Pac. Ry v. C. E. Ferguson Sawmill Co., 235 Fed 474 (8th Cir., 1916) 12

Procter & Gamble v. Byers Transp. Co., 335 F. Supp. 547 (W.D. Mo., 1973) 4

Railroad Yardmasters v. Indiana Harbor Belt Ry, 166 F.2d 326 (7th Cir., 1948) 13

Riss & Co. v. United States, 100 F. Supp. 468 (D. Mo., 1951) aff'd 342 U.S. 937, reh. den. 343 U.S. 937 ..... 7, 9

Steel, Inc. v. Atchison Top. & Santa Fe Ry, 41 F.R.D. 337 (D. Kans., 1966) 5

United States v. Carver, 260 U.S. 481 (1923) 3

United States v. Western Pac. R.R., 352 U.S. 59 (1956) 6

United States Gypsum Co. v. United States, 253 F.2d 738 (7th Cir., 1958) 9

Western Electric Co. v. Burlington Truck Lines, Inc., (8th Cir. No. 73-1200) 3

Statutes

49 U.S.C. § 16 ..... 2, 4
§ 16(1) 13
§ 16(2) 2
§ 16(3)(f) 2, 3, 5, 7
§ 17(6) 7
§ 17(8) 7
§ 305(g) 2
Act of June 7, 1924 6

Clayton Antitrust Act, § 5(b), 15 U.S.C. § 16(b) (1955), Ch. 253, § 2, 69 Stat. 283, formerly Ch. 323, § 5, 38 Stat. 731 (1914) 9

Rule 19, Supreme Court Rules 3

Rule 23(b)(3), Federal Rules of Civil Procedure 4

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BRIEF FOR PETITIONERS IN REPLY

The Petitioners, motor carriers, herein renew their prayer that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in the proceedings below on December 11, 1973.

INTRODUCTION

This petition presents a narrow but exceedingly important question concerning the proper interpretation of 49

U.S.C. §16(3)(f). The issue has arisen in a multitude of pending cases[1] arising out of an Interstate Commerce Commission rate-making order purporting to require motor carriers to pay refunds to shippers. The applicability of §16(3)(f) requiring suit "within one year from the date of the order" of the Commission in order to prevent extinguishment of the shippers' right to sue, depends entirely upon the issue of whether a shipper may sue a motor carrier under §16 of Part I of the Interstate Commerce Act. That issue has been presented in a directly related petition for certiorari presently pending. *A & B Transfer, Inc. v. S. S. Kresge Co.*, No. 73-1056 (petition for certiorari filed January 7, 1974). The question presented here is viable only in the event that the Seventh Circuit's prior decision in *Admiral-Merchants Motor Freight, Inc. v. Aluminum Company of America,* 486 F.2d 717 (7th Cir., 1973), U.S.S.C. No. 73-669, *cert den.* December 17, 1973 (in which it ruled that §305(g) of Part II of the Act incorporated §16(2) of Part I, creating a cause of action against motor carriers) was an accurate resolution of that issue. If the Seventh Circuit was wrong in that determination, then this petition should be granted and the Court below *summarily* reversed.

Respondents have confined their argument to the merits of the issue presented, rather than addressing themselves more fully to the issue of why the writ should or should not be granted. Indeed, displaying a significant lack of faith in the Circuit's ruling, Respondents suggest alternative solutions to the Circuit decision, which solutions conflict with the resolution by the Court below. Those very alternatives proposed by Respondents emphasize the necessity for the granting of certiorari herein, because the cases underlying those theories define another split between the circuits, and because acceptance of either of the alternative solutions would result in the granting of greater or different rights to some shippers in respect of the rates in issue than other shippers have been accorded, with resultant lack of uniformity between shippers.

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[1] See Petition for Cert., Appx. A.

Fortunately, the alternatives proposed by Respondents have been rejected by all courts to date in *this* series of cases. (That is, the series of cases reflected in Appendix A to the Petition).

It is also worthy of note that the Respondents' alternative issues and arguments do not flow from the decision upon which the Petitioners seek review, but consist of arguments rejected by the Circuit in rendering its decision upon the grounds that it did – namely, that § 16(3)(f) did not require suit until one year after judicial review had been concluded. The Respondents have not cross-petitioned, nor sought review on those issues.

The granting or denial of certiorari is not normally considered a ruling on the merits of the questions presented, but rather, a ruling upon the importance of the questions presented and on the considerations governing review on certiorari set forth in Rule 19. *Cf., United States v. Carver,* 260 U.S. 482, 490 (1923). By this petition and the related petitions[2] the Court has been requested to review issues of substantial importance concerning the proper application of the Interstate Commerce Act to motor carriers and their shippers.

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[2]See petition for certiorari in No. 73-1056, *A & B Transfer, Inc. v. S. S. Kresge Co.* A petition is being prepared and will be submitted within the next few days in *Appleton Electric Co. v. Advance-United Expresswaays,* ____ F.2d ____ (7th Cir. No. 73-1665, decided January 16, 1974.) Other cases, arising out of the same I.C.C. order, are on appeal and have been consolidated before the Eighth Circuit, and were orally argued on February 11, 1974. Those twelve cases are consolidated under the lead case entitled *Western Electric Co. v. Burlington Truck Lines, Inc.* (8th Cir. No. 73-1200). Motions to defer consideration of pending petitions for writ of certiorari until the Eighth Circuit decision can be consolidated with those of the Sixth and Seventh Circuits presently pending have been filed in No. 73-1056 and in the instant case, No. 73-1125. It is anticipated that a similar motion to defer will be filed in *Appleton, supra,* so that these cases, which all arise out of the same I.C.C. order, may be jointly considered with the determination of the Eighth Circuit when rendered.

One of the difficulties in these related proceedings to date has resided in the piecemeal nature of the various shippers' actions. Piecemeal consideration of various aspects of the problems created by the Commission's novel order has, for example, resulted in holdings in the district courts in the Eighth Circuit[3] that the substantive statute of limitations expired about March 15, 1972, whereas the Seventh Circuit found the expiration date to be December 27, 1972. The pending class litigation (referenced at n. 2, *supra*) opens new vistas for conflicts with respect to other carriers and shippers and the selected date applicable thereto.[4] All under the same I.C.C. order,[5] *Increased Rates and Charges From, To and Between Middlewest Territory*, 335 I.C.C. 142 (June 5, 1969).

The deviant rules and results which have prevailed in the courts below should be reviewed by this Court concurrently so that the Court may have before it the entire spectrum of

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[3] *E.g., Procter & Gamble v. Byers Transp. Co.*, 335 F. Supp. 547 (W.D. Mo., 1973), appeal pending, 8th Cir. No. 73-1201, argued 2/11/74.

[4] Many of the unnamed defendants have opted out of the defendant class in that Rule 23(b)(3) action. Currently, although the plaintiff class members have not been notified of the existence of the case three and one-half years after its commencement, named plaintiff therein is threatening to attempt to bring those defendants back into the case by service of process on them. (Pleading filed by named plaintiff February, 1974, in *Appleton Elec. Co. v. Advance-United Expressways* (N. Dist. Ill., E. Div., Docket No. 70-C-1427).)

[5] Additional splits, also under this I.C.C. order, have occurred. On the merits, the issue of whether an action for enforcement against motor carriers has been incorporated into Part II of the Act has resulted in a split decision in the Sixth Circuit in the *Kresge* case. (See n. 2, *supra*, and the petition itself disclosing some of the deviations from prior precedent in this Court). The lower courts have adopted a variety of interest rates ranging from 0% in the *Kresge* case to 6% in several of the other proceedings presently on appeal. Likewise, a variety of dates from which interest is said to run have been selected in the pending related cases by the lower courts. On the related question of awards of attorneys' fees, the courts have ranged from 0% to 94% of the base damage awards. Obviously, the result has been a total lack of uniformity in the *effective* rate levels between various shippers.

the litigation, as well as the inter-related issues, for full consideration of the impact of the order, proper overall interpretation of the Interstate Commerce Act as it applies to motor carriers, and the ramifications on the National Transportation Policy presented by this nationwide litigation.

REASONS FOR GRANTING THE WRIT

I.

The Seventh Circuit has decided this federal question in a way in conflict with this Court's decision in A. J. Phillips Co. v. Grand Trunk W. Ry, 236 U.S. 622 (1915), and the unbroken line of cases in this Court following that decision.

Respondents fail to come to grips with the fact that their complaint and action relied upon an order of the Interstate Commerce Commission of June 5, 1969. Assuming, without conceding, that their complaint, filed April 27, 1971, sought enforcement[6] of the Commission's order, it is apparent on the face of the pleadings that the plaintiffs failed to comply with the provisions § 16(3)(f):

> A complaint for the enforcement of an order of the Commission for payment of money shall be filed in the district court or the State court within one year *from* the date of the order, and not after.

This juxtaposition shows that suit was not commenced "within one year *from* the date of the order." In reversing that holding by the trial court, the Seventh Circuit ruled that:

> In our opinion the "date of the order" within the meaning of § 16(3)(f) is the date on which the

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[6] A suit under § 16 (not pleaded by these shippers) for "enforcement" is, in reality, a civil suit for damages. (*E.g., Steel, Inc. v. Atchis. Top. & Santa Fe Ry*, 41 F.R.D. 337 (D. Kans., 1966) based on the condition precedent of I.C.C.'s *prima facie* findings of affirmative past unlawfulness of past railroad charges, normally. E.g., *City of Danville v. C. & O. Ry*, 34 F. Supp. 620 (D. Va., 1940).)

> litigation prosecuted by the carriers to obtain judicial review of the Commission's order was completed.
> Petition for Certiorari, Appx D(2) at D-6.

That ruling disinters a contention which this Court buried almost 60 years ago. In the *Phillips* case,[7] the shipper's right of action was held extinguished notwithstanding that its suit had been commenced within two years[8] of the final Supreme Court affirmance of the Commission's findings underlying the proposed action. The rules established in *Phillips* regarding the proper construction of substantive limitations provisions such as the one here in issue have prevailed to the present day. Nor do Respondents suggest any precedent in this Court deviating therefrom, although they do reference cases of other circuits plainly in conflict with the rule handed down by the Seventh Court in this proceeding in Parts II and III of their Brief in Opposition.

The Respondents now assert that the defense of the statute of limitations cannot be argued by the carriers, and that they are estopped or have waived their rights. (Brief in Opposition, p. 8). But that argument is contrary to compelling precedent also. *E.g., Mid-State Horticultural Co. v. Pennsylvania R.R.*, 320 U.S. 356 (1943); *United States v. Western Pac. R.R.*, 352 U.S. 59, 76 (1956) (and cases cited); *Phillips, supra*, 236 U.S. at 668.

The further contention in the Brief in Opposition (pp. 7, 8) that the decision permitting these shippers to sue conformed with the Act's underlying uniformity principle is preposterous. Permitting these shippers' separate action will only increase the lack of uniformity as to the charges involved. *Cf., Keogh v. Chicago & N.W. Ry*, 260 U.S. 156 (1922). See n. 5, *supra*, and related text.

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[7] *A. J. Phillips Co. v. Grand Trunk W. Ry*, 236 U.S. 662 (1915).

[8] The then-effective term of the virtually identical provisions. The shorter, one year provision, later passed by Congress is substantially similar but cannot be interpreted as providing a longer period for suit. See Act of June 7, 1924, which amended the section generally and divided it into subsections.

In justification of its decision, the Seventh Court infers that the Commission order is not final or enforceable before judicial review is completed. Petition for Cert., Appx D(2) at D-6. That rationale itself presents a substantial conflict with the prior decisions holding that an order is final at such point in time when it is final before the tribunal entering it. But more impressive is the fact that the same Circuit has upheld a judgment entered on this I.C.C. order entered *before* the final stages of the direct review action. *Admiral-Merchants Motor Freight, Inc. v. Aluminum Co. of America,* 486 F.2d 717 (7th Cir., 1973), affirming Nov. 1971 decision in *Aluminum Co. of America v. Admiral-Merchants Motor Freight, Inc.,* 337 F. Supp. 672 (N.D. Ill., 1971).

The Interstate Commerce Act itself explicitly and thoroughly defines the attributes of finality in connection with enforcement of Commission orders. See generally, §17 of Title 49. And, the *permitted* deviations within the statutory scheme are explained in §17(8), wherein Congress has provided that even an application for rehearing in the circumstances of the present case would not stay or postpone the enforcement of the order entered by the full Commission "without the special order of the Commission."[9]

Even though petitions for reconsideration were filed with the Commission to reopen and reconsider, under its continuing jurisdiction,[10] no special order of the Commission was entered operating to stay the refund language so as to delay the time within which enforcement thereof must be sought. The later orders denying reopening and reconsideration did not affect the finality of the June 5 full Commission order. See notes 11 and 17, *infra.* Indeed, judgment might have been rendered by a court even while the petitions were pending before the I.C.C. *Gulf, M. & N. R.R. v. Merchants'*

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[9]No suspension of the one year period is provided for in the provisions conditioning the right to sue, itself. 49 U.S.C. §16(3)(f).

[10]49 U.S.C. §17(6). See *B. & O. R.R. v. United States,* 386 U.S. 372 (1967); *Chicago & N.W. Ry v. United States,* 311 F. Supp. 860 (N.D. Ill., 1970); *Riss & Co. v. United States,* 100 F. Supp. 468 (D. Mo., 1951), aff'd 342 U.S. 937, reh. den. 343 U.S. 937.

Specialty Co., 50 F.2d 21 (5th Cir., 1931); *Corray v. B. & O. R.R.*, 2 F. Supp. 829 (E.D. Ill., 1933).[11]

The order of June 5, 1969 was enforceable on June 5, 1969, if at all, and *one year from the date of the order expired prior to the commencement of the class suit*[12] *referenced by the Respondents and prior to the entry of any restraint in the direct review litigation.*[13] That year expired June 5, 1970 – almost eleven months before the shippers' suit was filed in the trial court below.

Paramount among the considerations which should be given effect here is the fact that Congress did *not* provide that suit might be brought within one year after the final determination had been made in a direct review proceeding, if such

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[11] "The carrier appeals and relies on two grounds for reversal. The first is that the order of reparation was not final. That order was issued by the commission March 11, 1929, and allowed appellant until April 26 following to make reparation. This action was brought in the district court in September 1929, appellant having failed up to that time to comply with the commission's order by making reparation, or to apply for a rehearing. In March, 1930, appellant filed before the commission a petition for rehearing, which was granted in May of that year. The Interstate Commerce Act provides that commission may establish general rules governing applications for rehearings, but that no such application shall excuse a carrier from obeying any order of the commission or operate to stay or postpone the enforcement thereof without special order; and that suit may be brought in the appropriate district court and be prosecuted in all respects like other civil suits for damages, if the carrier does not comply with an order of the commission for the payment of money within the time limit prescribed in such order. 49 USCA §§16a and 16(2). *The order of reparation had become final* under a rule of the commission before this suit was brought . . . ."
Gulf, M. & N. R.R. v. Merchants' Specialty Co., 50 F.2d 21 (5th Cir., 1931) (emphasis added).

[12] Filed June 15, 1970. Service on named defendants therein was made at even later dates. Notice to many unnamed defendants therein was sent in October of 1973; some have not yet been notified.

[13] On June 19, 1970, a T.R.O. entered prohibiting the government, a party, from enforcing the order, *et cetera*, in *Admiral-Merchants Motor Freight, Inc., v. United States*, 321 F. Supp. 359 (D. Colo., 1971).

proceedings were instituted.[14] The strained interpretation of the "plain language" of the statute embraced by the Seventh Circuit involves the rejection by the Circuit of the same rule which it has applied in a related case.[15] The result is an open-ended statute, since a review action may be commenced at almost any later date after the order has entered. See, e.g., *Riss & Co. v. United States*, 100 F. Supp. 468 (D. Mo., 1951), aff'd 342 U.S. 937, reh. den. 343 U.S. 937.

II.

The inconsistent alternative theories offered by Respondents in lieu of the decision below underline the conflicts between the circuits on the issue actually presented. The proposals conflict with the Seventh Circuit decisions and inter se. They would result in either indefinitely extended periods or no limitations at all. Congress obviously intended

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14 That Congress knows how to create statutes dependent for their running upon related court proceedings, if that is its desire, or intent, is made clear by 15 U.S.C.A. §16(b), the statute involved in the *American Pipe* case discussed at Section II, *infra*.

> Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commended either within the period of suspension or within four years after the cause of action accrued.
>
> Clayton Antitrust Act, §5(b), 15 U.S.C. §16(b) (1955), Ch. 253 §69 Stat. 283, formerly Ch. 323, §5, 38 Stat. 731 (1914).

15 See *Admiral-Merchants Motor Freight, Inc. v. Aluminum Company of America*, 486 F.2d 717 (7th Cir., 1973), *cert den.* December 17, 1973 (wherein the Court relied upon the "plain language" of the statute there in issue, citing *United States Gypsum Co. v. United States*, 253 F.2d 738, 744 (7th Cir., 1958)).

that there be a termination of suits within a given time and concurrent extinguishment of rights.

Respondents rely, in the alternative, upon the recent decision of this Court entered in *American Pipe and Construction Co. v. Utah, 42 U.S.L.W. 4155 (1973). Assuming the class action to have been instituted within the statute,* they contend that such class action would toll the statute of limitations for all purposes so that an independent suit might be brought at any time prior to the determination that such class action will not lie, and thereafter until the statute, as so interrupted, would have expired.

In *American Pipe* there seems to have been a dispute regarding whether the statute of limitations actually conditioned the right to sue – *i.e.*, whether it was substantive. No such dispute exists here. The regulatory scheme of the Interstate Commerce Act is, also, far different from the policies and purposes of the anti-trust laws involved in *American Pipe*. And, the limitations provisions bear no resemblance to each other. See n. 14, *supra.*

But the case is inapposite for a more fundamental reason. There, the issue was whether a plaintiff could intervene against the named defendants in the class suit which had, a few days earlier, been declared not to be a class action. The issue here, raised for the first time on appeal, is whether the shippers could belatedly maintain separate suit against 67 defendants in a class suit which were unnamed[16] and unnotified at the time of these shippers' separate action.

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[16]Plus 15 of the defendants named therein. The unnamed carrier defendants were not given notice of the pendency of the class suit, nor opportunity to opt out of that action (an opportunity, incidentally, which eviserated any hope of uniformity between the various 1,400 carriers and between the millions of shippers involved) until October, 1973. Thus, the shippers' argument here seeks to exhume their extinguished rights by belated suits against those unnamed class members even though, prior to this suit, those carriers had no notice of the pendency of these shippers' claims within the usual (statutory) one year set by Congress; nor for several years after the first shipments (May, 1968).

Furthermore, in *American Pipe*, the reliance of the intervenors upon the pendency of the class action was rather apparent in view of their prompt action after the case was found inappropriate for class handling. In the related class suit here involved, the alleged members of the plaintiff class have never been notified of the existence of the action. *Appleton Electric Co. v. Advance-United Expressways*, ____ F.2d ____ (7th Cir., 1974). And, there is nothing whatsoever to substantiate a contention of reliance upon the pendency of that action to justify the shippers' attempt to commence separate litigation almost a full year after the limitations provision expired by its own terms and almost three years after the first shipments involved (shipped May 20, 1968).

Respondents' argument in this regard would result in the extension of a substantive limitation provision for the entire duration of pending class litigation, with the result that the one year statute enacted by Congress would, in the circumstances, still be open today, four and one-half years "from the date" the order was entered. That this result was rejected by the Seventh Circuit below is manifest in its determination that the statute began to run "when tne judicial review sought by the carriers was concluded and the stay which had been entered by the district court in Colorado was lifted." Or, in other words, that the statute extinguished the right to sue on December 27, 1972, one year after the final dismissal of the precautionary appeal in the Tenth Circuit (December 27, 1971).

Nor is it anomalous to hold that while the Respondents might have successfully intervened in a class suit, they cannot maintain a separate action. If a class suit was operative to toll the §16(3)(f) limitations at all, it did so only for class members. But the Respondents below elected to commence separate litigation, which, by necessary inference, made their election and deprived them of the protection of any pending class litigation.

III.

There is no warrant in law or reason for having a "fixed date" which varies from shipper to shipper and which may vary, as well, from carrier to carrier with respect to each shipper claiming under a single I.C.C. order.

Respondents renew, in this Court, their argument that the explicit provisions of the statute did not foreclose suit for a shipper until one year after it had presented its claims to the carriers. This action, Respondents *allege*, did not occur until early 1971. (Brief in Opposition, pp. 10, 11).[17] Thus, as to these two shippers, the argument concludes, the statute did not run until early 1972.

Respondents urge that they cannot sue until the date set for compliance. Brief in Opposition, page 14, citing *I.C.C. v. Atlantic Coast Line R.R.*, 383 U. S. 576, 596 (1966). We

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[17] Petitioners contest this fact asserted by Respondents. It is without evidentiary support in the record below. The June 5, 1969 order (P. for Cert., Appx. B(4) at B-25, 26) did not say "file claims". That instruction to shippers was added by the order of August 29, 1969 (P. for Cert., Appx B(5), at B-32), when the I.C.C. advised the carriers to "make refund to shippers presenting their claims supported by paid freight bills or other appropriate evidence." Petitioners contest the fact asserted by these shippers that *any* "claims supported by paid freight bills or other appropriate evidence" have *ever* been presented to these carriers by these shippers. Additionally, this requirement was not a modification of the June 5, 1969 final refund order, but, as the I.C.C. later indicated (P. for Cert., Appx B(6), at B-34) was merely a statement describing more fully where the burden lay for supporting claims for refunds. *Cf., Missouri Pac. Ry v. C. E. Ferguson Sawmill Co.*, 235 Fed. 474, 477 (8th Cir. 1916), wherein the court noted that the later orders merely modified the first and "final" order in a formal particular which was immaterial to damages (or, "liability" as the I.C.C. said on October 27, 1969), since the later order did not change the date fixed there for payment (compliance). Since no such date was *ever* fixed in *this* case, the claims filing requirement must be considered merely formal. Clearly it was not intended to modify substantive rights under the June 5 order, or to establish *either* the compliance date *or* the commencement of the limitation period.

agree. We also agree that there was no date set for compliance. See Brief in Opposition, page 14. Compare the requirements of 49 U.S.C. §16(1). But, we *conclude* that since there was no compliance date, there could have been no default and that *the shippers therefore had no claim for enforcement* – even if the refund order was a valid exercise of administrative authority. See *Railroad Yardmasters v. Indiana Harbor Belt Ry,* 166 F.2d 326 (7th Cir., 1948).

It requires no further argument to disclose that Congress intended that there *be* a statute of limitations when it prescribed that suits must be filed "within one year from the date of the order." Nor does it require further argument to establish that the Congress intended that there be a single date applicable to all shippers and all carriers affected by a single order. It is equally clear that Congress intended that the extinguishment of the right to sue was not to be variable between shippers, nor between carriers which had transported traffic for particular shippers. See *A. J. Phillips Co. v. Grand Trunk W. Ry,* 236 U.S. 662, 667 (1915).

The order of June 5, 1969, was a final order. "One year from the date of the order" expired June 5, 1970 and on that date the rights, if any, of *all* shippers which had not sued were extinguished, uniformly. The statute is clear and not in need of interpretation or construction. The special revival of *these* shipppers' rights by distortion and disregard of that clear, plain language does not foster the underlying principle of the Act – uniformity of rates and charges.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit, thus permitting a full presentation to this Honorable Court upon the merits, displaying the conflicts in existence between the circuits and the conflict between the decision sought to be reviewed, on the one hand, and established precedent of this Court, on the other. Alternatively, Petitioners pray that

this Court accept jurisdiction and summarily reverse the judgment of the Court below, affirming the trial court's judgment granting the dismissal of the complaint with prejudice.

Respectfully submitted,

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